

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's	)	PR Docket No. 93-144
Rules to Facilitate Future Development of	)	RM-8117, RM-8030
SMR Systems in the 800 MHz Frequency Band	)	RM-8029

and

Implementation of Section 309(j) of the	)	
Communications Act-Competitive Bidding	)	PP Docket No. 93-258
800 MHz SMR	)	

To: The Commission

**MOTION TO DEFER ACTION**

The following persons and entities ("Movants"), by and through counsel, hereby move the Commission to defer and delay any decision on the above captioned matter until such time as the United States Congress has been provided an opportunity to engage in hearings to determine whether the Commission's auction authority would be properly applied in the event that the proposals are adopted. Movants are:

**California**

Fresno Mobile Radio, Inc. of Fresno, California  
Madera Radio Dispatch, Inc. of Madera, California  
Applied Technology Group, Inc. of Bakersfield, California  
G & K Rentals of Bakersfield, California  
Alpha Radio Service of Bakersfield, California  
Cumulous Communications Corporation of Fresno, California  
Mobile Communications, Inc. of Merced, California  
L. Clarke Phillips of Chicago Park, California  
McGee Communications Electronics, Inc. of Stockton, California  
Ray's Radio, Inc. of Modesto, California  
Eden Communications, Inc. of Salinas, California  
X.W. Corporation d/b/a John Mitchell Company of Fullerton, California  
Mobile U.H.F., Inc. of Garden Grove, California

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE  
SECRETARY

Dec 4 '95

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A-1-A Security & Communications of Westminster, California  
Radiowave Communications, Inc. Of Long Beach, California  
Anderson Communications Corporation of Palm Desert, California  
Wise Electronics, Inc. of Brawley, California  
Communications Licensing Consultant of San Diego, California  
John Cook of Escondido, California  
Peak Relay of Valley Center, California  
Hi-Desert Communications of Hesperia, California

#### **Washington State**

Radio Link Company of Seattle, Washington  
Columbia Communications, Inc. of Kennewick, Washington  
Spectrum Communications, Inc. of Moses Lake, Washington  
Americell Communications of Wilbur, Washington  
Whisler Communications of Olympia, Washington  
Spokane Paging & Telecommunications, Inc. of Spokane, Washington

#### **Oregon**

Silke Communications, Inc. of Eugene, Oregon  
Starfone of Medford, Oregon

#### **Arizona**

Pro Tec Mobile Communications, Inc. of Casa Grande, Arizona  
Gila Electronics of Yuma, Arizona  
Durham Communications, Inc. of Mesa, Arizona  
Joriga Electronics of Tempe, Arizona

#### **Nevada**

Advanced Communications, Inc. of Sparks, Nevada  
Bill Ashby of Sparks, Nevada  
Cindy McGee of Reno, Nevada

#### **Utah**

GSC Electric & Communications of Kearns, Utah

#### **New Mexico**

Specialty Communications of Albuquerque, New Mexico

### **Colorado**

Omni Range Communications of Aurora, Colorado  
Bran-Dex Wireline Services, Inc. of Sterling, Colorado

### **South Dakota**

Communications Center, Inc. of Pierre, South Dakota  
Dakota Electronics of Aberdeen, South Dakota  
Vantek Communications of Sioux Falls, South Dakota

### **Nebraska**

Mobile Communications, Inc. of Omaha, Nebraska  
D & D Communications of Lincoln, Nebraska

### **Oklahoma**

Dave Fant Company d/b/a Oklahoma Radio Systems of Oklahoma City, Oklahoma  
Leon's Radio, Inc. of Oklahoma City, Oklahoma  
Total Com, Inc. of Enid, Oklahoma

### **Texas**

CommNet Communications Network, Inc. of Dallas, Texas  
Mobile Relays, Inc. of McAllen, Texas

### **Louisiana**

Communications Center, Inc. of Covington, Louisiana

### **Wisconsin**

Viking Communications, Inc. of Milwaukee, Wisconsin  
Communications Electronics of Fond du Lac, Wisconsin  
Air Communications of Central Wisconsin, Inc. of Wisconsin Rapids, Wisconsin  
JSM Systems, Inc. of Sheboygan Falls, Wisconsin  
4X Corporation of Appleton, Wisconsin  
Nielson Communications, Inc. of Green Bay, Wisconsin  
Camel Communications, Inc. of Cedarburg, Wisconsin  
Milwaukee Repeater Service, Inc. of West Allis, Wisconsin  
Concept—20 Communications, Inc. of Salem, Wisconsin  
Bandt Communications, Inc. of Janesville, Wisconsin

### **Illinois**

Supreme Radio Communications, Inc. of Peoria Heights, Illinois  
Craig Antenna Service of Pana, Illinois  
Stateline Communications, Inc. of Orangeville, Illinois

### **Michigan**

DeltaCom, Inc. of Detroit, Michigan  
Electronic Communications Company of Detroit, Michigan  
Midcom Service of Muskegon, Michigan  
General Communications Company of Grand Rapids, Michigan  
Johnson Repeater Company of Gaylord, Michigan  
Kay Communication of Saginaw, Michigan  
State Systems Radio, Inc. of Kalamazoo, Michigan  
Ernst Concrete & Supply Company of Warren, Michigan

### **Indiana**

Mobile Communications Corporation of South Bend, Indiana

### **Ohio**

Domer Communication, Inc. of North Canton, Ohio  
E.A. Henson of North Canton, Ohio  
Donald R. Nelsch d/b/a Donnel Communications of North Canton, Ohio  
Omnicall of Columbus, Ohio

### **Kentucky**

C&C Communications of London, Kentucky

### **Tennessee**

Memphis 3rd Mobile Associates of Memphis, Tennessee  
Billy Rutledge of Bluff City, Tennessee

### **Pennsylvania**

Robert J. Fetterman d/b/a R.F. Communications of Catawissa, Pennsylvania  
Communicom of York, Pennsylvania  
Baycomm, Inc. of Paoli, Pennsylvania  
Centre Communications of Bellefonte, Pennsylvania

### **Delaware**

Baycomm, Inc. of Bear, Delaware  
American Industrial & Marine Electronics of Dover, Delaware

### **Maryland**

Charles C. Stull of Frederick, Maryland  
Ed Lachowicz of Lutherville, Maryland  
Frank Savarese of Lutherville, Maryland  
LP Communications of Lutherville, Maryland  
Commercial Electronics Services, Inc. of Waldorf, Maryland  
C & H Electronic Services, Inc. of Waldorf, Maryland  
Two-Way Radio, Inc. T/A TWR Communications of Cumberland, Maryland  
Action Radio of Wheaton, Maryland

### **Virginia**

Mid Atlantic Communications, Inc. of Fredricksburg, Virginia  
LandAir Communications & Electronics, Inc. of Virginia Beach, Virginia  
Business Autophones, Inc. of Roanoke, Virginia  
Valley Communications of Union Hall, Virginia  
Specialty Electronics Systems Company, Inc. of Lynchburg, Virginia  
Piedmont Electronics Company of Charlottesville, Virginia  
VA-KY Communications of Wise, Virginia  
LMR International, Inc. of McLean, Virginia  
Professional Communications of Blacksburg, Virginia  
Linden SMR Associates of Front Royal, Virginia  
Atlantic Communications, Inc. of Newport News, Virginia  
Valley Two Way, Inc. of Winchester, Virginia

### **North Carolina**

Professional Communications, Inc. of Fayetteville, North Carolina  
Goldsboro Communications of Goldsboro, North Carolina

### **South Carolina**

CoastCom, Inc. of Garden City, South Carolina  
Riley's Communications, Inc. of Newberry, South Carolina

### **Georgia**

Donald Arsenault of Gainsville, Georgia

### **Florida**

Communications Service Center of Bradenton, Florida  
Lynn D. Clark of Venice, Florida

### **New York**

T & K Communications, Inc. of Owego, New York  
Genesee Business Radio Systems, Inc. of Rochester, New York  
Allstate Mobile Communications Corporation of Rochester, New York  
JPJ Electronic Communications, Inc. of Yorkville, New York  
Furman Communications, Inc. of Savannah, New York  
Bush Electronics, Inc. of Liverpool, New York  
Metro Electronics Service of Western New York, Inc. of Cheektowaga, New York  
Central Radio Communications Corporation of Deer Park, New York  
Cellular Design Corporation of Deer Park, New York  
Mobile Radio Network, Inc. of North Babylon, New York  
FM Communications of Tonowanda, New York

### **New Jersey**

Frequency Plus Corporation of East Brunswick, New Jersey  
Mobile Radio Dispatch Service, Inc. of East Brunswick, New Jersey  
Waxman Communications Corp. of Lindenwood, New Jersey

### **Connecticut**

Utility Communications, Inc. of Hamden, Connecticut

The 128 Movants represent companies and persons within 30 states, all of which have either previously included their objections to the Commission's intended adoption of its proposals within this proceeding, or hereby added their voice in objection to the Commission's intended actions. Movants represent a substantial portion of the SMR marketplace which would be adversely affected by the Commission's adoption of its proposals, as would the tens of thousands of subscribers, end users, and customers served by Movants.

### The Situation Demands Clarification

The Commission has proposed within this proceeding a novel use of its auction authority, which has never been tested before the courts or clarified by the U.S. Congress to the degree necessary to provide the Commission with sufficient assurances of its authority to adopt the proposals. Indeed, substantial doubt exists as to whether the Commission possesses sufficient authority from the U.S. Congress to adopt rules in accord with its proposals. That such doubt is real and not merely speculative is demonstrated by the correspondence received by the Commission from eleven members of the U.S. Congress who have clearly expressed that they do not hold that the Commission's adoption of its proposals would be within the auction authority articulated within Section 309 of the Communications Act of 1934 (as amended), see, Letter from U.S. Congressman Michael D. Crapo *et. al.* dated October 26, 1995.

Most of the Movants have earlier participated in this proceeding and have challenged the propriety of the intended adoption of the Commission's proposals and have included within that challenge an articulation of the problems which the Commission faces in justifying its authority in adoption, see, Further Comments filed by Fresno Mobile Radio, Inc. *et. al.*<sup>1</sup> Other opponents have also challenged the Commission's authority within this

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<sup>1</sup> Movants have also filed motions before the United States Department of Justice and the Federal Trade Commission, requesting their participation in this proceeding to determine whether adoption of the Commission's proposals would create an impermissible anticompetitive result in accord with the Communications Act, see, Motions filed by Fresno Mobile Radio, Inc. *et. al.* presented within this docket. Such motions were deemed appropriate in view of the Commission's oft stated reluctance to address issues arising under the antitrust statutes of the United States. Movants, therefore, respectfully suggest that the

proceeding. Accordingly, the issue of the Commission's authority is clearly a matter of record within this proceeding which begs an answer prior to any formal rule making decision. It is necessary and prudent that the Commission determine first, what it is empowered to do before it decides what to do. To ignore this core issue would be to suggest that the Commission is either unaware or unconcerned about the parameters of its auction authority and has chosen, instead, to move forward with capriciousness.

It is also clear by the Wireless Telecommunications Bureau's announcement on September 18, 1995 that this issue has not been fully addressed. Nowhere within that public meeting was there provided any justification of the Commission's actions which included any explanation of the Commission's interpretation of the relevant statutes that might provide such authority. It, therefore, falls upon the Commission to take such steps as are necessary to determine the parameters of its authority prior to exercising any presumed penumbra of its mandate from the U.S. Congress.

Certainly the Commission cannot believe that its authority is wholly unfettered and subject only to increasingly expansive interpretations. The plain language of the Communications Act belies such an opinion. Therefore, boundaries do exist and adoption of the proposals within this proceeding, at the least, encroach upon those boundaries and, more likely, exceed those boundaries, thereby creating a formula for failure following a court

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Commission would also benefit by these agencies' expert contributions and grant of the instant Motion would provide additional time to receive those agencies' comments which Movants deem to be invaluable to the Commission.



challenge of any adoption. Since there exists a substantial likelihood that adoption of the Commission's proposals would be reversed by the U.S. Court of Appeals, absent a clearer articulation of the Commission's auction authority by the U.S. Congress which included a mandate for the Commission to proceed toward adoption of its proposals, the Commission should avoid the adoption of rules which are likely to be later reversed and nullified.

### The Likelihood Of Hearings

Movants have had substantial contact with members of the U.S. Congress, including the members of the U.S. Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications which have stated an intention to hold hearings on this issue within the first two weeks of December 1995. Members of the association SMR WON have secured assurances that the hearings will take place in the near term.<sup>2</sup> *Telecommunications Reports* has stated in recent articles that the Senate aides serving the subcommittee have confirmed the intention to hold such hearings in the near term. Movants have been provided further assurances that the U.S. Congress intends to address directly the issue and provide necessary guidance to the Commission relevant to this proceeding and future proceedings. Accordingly, the instant request will not create any unnecessary burden on the Commission if granted. Instead, all parties will be provided with necessary clarity on this central question.

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<sup>2</sup> That such discussions have taken place and have resulted in the above described declarations may be confirmed by the staff members of United States Senator Larry Pressler's office who have provided such information to Movants.

The Commission's deferment would provide additional impetus for early scheduling of the hearings and would properly position the Commission as the servant of the U.S. Congress in meeting those mandates created by and through revisions in the Communications Act and the U.S. Congress' stated intentions in making such revisions, such as the adoption of the Commission's limited auction authority. Given the apparent need for such clarification felt within this proceeding, it has become incumbent on the Commission to defer this decision to the U.S. Congress to avoid inconsistent rulings from two bodies of government. To find a reason for grant of this Motion, one need only consider the legislative chaos which would ensue if the Commission adopts the proposals, then later Congressional hearings declare that such adoption is without Congressional authority.

Nor should the Commission subject the industry to this manner of legislative uncertainty. Such action would be without benefit to anyone and would chill the effectiveness of the Commission's action while interested persons were left to wait for the second answer from the U.S. Congress before acting. Further, the Commission should not place itself in a potentially vulnerable position, whereby the U.S. Congress might be forced to question and act to reverse the Commission's fresh decision. Such action by the U.S. Congress would undermine the credibility of the Commission in its making of future decisions, leaving open forever proceedings which would otherwise enjoy the benefit of closure which is administrative finality.

### Balancing of Interests

The injury and irreparable harm to Movants has been well articulated in this proceeding. There can be no doubt that adoption of the Commission's proposals will necessitate a substantial sacrifice by Movants. That such sacrifices would need to be made is undisputed by any of the Commission's proposals or any comments received within this proceeding, including those few comments supporting adoption. Accordingly, the issue of irreparable harm to Movants is well established within this docket and weighs in favor of grant of the instant Motion.

Conversely, no harm will result to any person as a result of grant of this Motion. First, the time period articulated by the U. S. Congress between this date and the date for hearings is intended to be brief. Therefore, the deferment requested will also be brief, simply allowing for such hearings to take place and the production of whatever means of communicating the U.S. Congress' position its members deem appropriate. Second, no commenting party has made a case that it will sustain injury arising out of delay, nor could any credible argument be made regarding a deferment period of only a month. In fact, no commenting party could make such a showing since no party would be positioned to state that it had reasonably relied on any scheduled action by the Commission.

As stated *supra*, the Commission would also be unharmed by its grant of the instant Motion and, in fact, would be benefitted by avoiding administrative waste, legislative

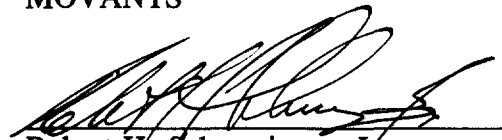
uncertainty, and likely challenges at the U.S. Court of Appeals. Therefore, it is in the Commission's interest to delay any decision within this proceeding.

Since there is no person which might be harmed by the Commission's grant of the instant Motion and since Movants would be substantially and irreparably harmed by the Commission's going forward following rejection of this Motion, any rational balancing of interests weighs heavily in favor of grant of this Motion.

#### Conclusion

For the above stated reasons, Movants request that the Commission defer any decision on the proposals presented within this proceeding until such time as the U.S. Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications has been provided an opportunity to hold hearings and decide with greater clarity whether adoption of the Commission's proposals would be an *ultra vires* act.

Respectfully submitted,  
MOVANTS

  
Robert H. Schwaninger, Jr.

Dated: 12/4/95

Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, DC 20006  
202/223-8837

## **CERTIFICATE OF SERVICE**

I hereby certify that on this fourth day of December, 1995, I served a copy of the foregoing Motion to Defer Action on the following by placing a copy in the United States Mail, first class postage prepaid:

Chairman Reed E. Hundt  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner James H. Quello  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Andrew C. Barrett  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Rachelle B. Chong  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Susan Ness  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

William E. Kennard  
General Counsel  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Gerald P. Vaughan  
Acting Chief, Wireless Telecommunications  
Bureau  
Federal Communications Commission  
2025 M Street, N.W.  
Washington, D.C. 20554

The Honorable Janet Reno  
United States Attorney General  
United States Department of Justice  
10th and Constitution Avenues, N.W.  
Washington, D.C. 20530

William J. Baer  
Director, Bureau of Competition  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

The Honorable Michael D. Crapo  
United States House of Representatives  
437 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Frederick S. Upton  
United States House of Representatives  
2333 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Lane Evans  
United States House of Representatives  
2335 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable James A. Hayes  
United States House of Representatives  
2432 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Bart Gordon  
United States House of Representatives  
2201 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Constance A. Morella  
United States House of Representatives  
106 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Blanche Lambert Lincoln  
United States House of Representatives  
1206 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Richard H. Baker  
United States House of Representatives  
434 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Jay Dickey  
United States House of Representatives  
230 Cannon House Office Building  
Washington, D.C. 20515

The Honorable W.J. Tauzin  
United States House of Representatives  
2183 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable George Nethercutt  
United States House of Representatives  
1527 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Robert Dole  
United States Senate  
141 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Thomas A. Daschle  
United States Senate  
509 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Newt Gingrich  
United States House of Representatives  
2428 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Richard A. Gephardt  
United States House of Representatives  
1226 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Larry Pressler  
United States Senate  
243 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Ted Stevens  
United States Senate  
522 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable John McCain  
United States Senate  
241 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Conrad R. Burns  
United States Senate  
187 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Slade Gorton  
United States Senate  
730 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Trent Lott  
United States Senate  
487 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable John Ashcroft  
United States Senate  
170 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Ernest F. Hollings  
United States Senate  
125 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Daniel K. Inouye  
United States Senate  
722 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Wendell H. Ford  
United States Senate  
173A Russell Senate Office Building  
Washington, D.C. 20510

The Honorable J.J. Exon  
United States Senate  
528 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable John F. Kerry  
United States Senate  
421 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable John B. Breaux  
United States Senate  
516 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable John D. Rockefeller  
United States Senate  
109 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Jack Fields  
United States House of Representatives  
2228 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Michael G. Oxley  
United States House of Representatives  
2233 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Carlos J. Moorhead  
United States House of Representatives  
2346 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Daniel Schaefer  
United States House of Representatives  
2353 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Joseph Barton  
United States House of Representatives  
2264 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable J.D. Hastert  
United States House of Representatives  
2453 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Clifford B. Stearns  
United States House of Representatives  
2352 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Bill Paxon  
United States House of Representatives  
2436 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Paul E. Gillmor  
United States House of Representatives  
1203 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Scott Klug  
United States House of Representatives  
1113 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Christopher Cox  
United States House of Representatives  
2402 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Nathan Deal  
United States House of Representatives  
1406 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Daniel Frisa  
United States House of Representatives  
1529 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Rick White  
United States House of Representatives  
116 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Tom Coburn  
United States House of Representatives  
511 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Edward J. Markey  
United States House of Representatives  
2133 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Ralph M. Hall  
United States House of Representatives  
2236 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable John Bryant  
United States House of Representatives  
2330 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Rick Boucher  
United States House of Representatives  
2245 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Thomas J. Manton  
United States House of Representatives  
2235 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Edolphus Towns  
United States House of Representatives  
2232 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Gerry E. Studds  
United States House of Representatives  
237 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Bart Gordon  
United States House of Representatives  
2201 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Bobby L. Rush  
United States House of Representatives  
131 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Anna G. Eshoo  
United States House of Representatives  
308 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Ron Klink  
United States House of Representatives  
125 Cannon House Office Building  
Washington, D.C. 20515

The Honorable John R. Kasich  
United States House of Representatives  
1131 Longworth House Office Building  
Washington, D.C. 20515



Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900, East Tower  
Washington, D.C. 20005

Counsel for:  
Pittencrief Communications, Inc.  
E.F. Johnson Company  
Gulf Coast Radio Fone  
Deck Communications, Inc.  
Nodak Communications  
Wiztronics, Inc.  
Raserco, Inc.  
Vantek Communication, Inc.  
Southern Minnesota Communications  
Brandon Communications, Inc.  
Dakota Electronics  
Bis-Man Mobile Phone, Inc.  
Rayfield Communications  
B & C Communications  
Radio Communications Center  
Keller Communication, Inc.  
Don Clark Radio Communications  
Pro-Tec Mobile Communications  
Automated Business Communication  
Morris Communications  
Nielson Communications  
E.T. Communications Company  
Bolin Communications System  
Diamond "L" Industries, Inc.

Mark J. Golden  
Meyer, Faller, Weisman & Rosenberg, P.C.  
4400 Jennifer Street, NW  
Suite 300  
Washington, DC 20015

Counsel for:  
Personal Communications I

Young & Jatlow  
2300 N Street, N.W.  
Suite 600  
Washington, D.C. 20037

Counsel for:  
Ericsson Corporation

Lukas, McGowan, Nace & Gutierrez  
1111 19th Street, N.W.  
Washington, D.C. 20036

Counsel for:  
Fisher Communications, Inc.  
American Mobile Telecommunications Assoc.

Motorola, Inc.  
1350 Eye Street, N.W.  
Suite 400  
Washington, D.C. 20005

Wiley Rein & Fielding  
1776 K Street, NW  
Washington, DC 20006

Counsel for:  
Robert J. Butler

Kelly & Povich, P.C.  
1101 30th St., N.W.  
Suite 300  
Washington, D.C. 20007

Counsel for:  
Advanced Mobilecomm, Inc.

Mintz, Levin, Cohn, Ferris, Glovsky, &  
Popeo, P.C.  
701 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

Counsel for:  
McCaw Cellular Communications, Inc.

Blooston, Mordkofsky, Jackson & Dickens  
2120 L Street, NW  
Suite 300  
Washington, DC 20554

Counsel for:  
The SMR Small Business Coalition

William R. Miller  
Russ Miller Rental  
3620 Byers Avenue  
Fortworth, Texas 76107

Joel Freedman  
Vice President, General Counsel  
Dial Call Communications  
1355 Peachtree Street, Suite 755  
Atlanta, GA 30309

Mark Lindquist  
Communications Center, Inc.  
Box 1034  
Pierre, SD 57501

John D. Pellegrin  
1140 Connecticut Avenue, N.W.  
Suite 606  
Washington, DC 20036

Counsel for:  
American SMR Company

Duncan C. Kennedy  
Genesee Business Radio  
992 Cater Street  
Rochester, NY 14621-1910

Meyer, Faller, Weisman  
& Rosenberg, P.C.  
Allan S. Tilles  
4400 Jenifer Street, NW  
Suite 380  
Washington, DC 20015

Counsel for:  
Parkinson Electronics

Ross & Hardies  
888 16th Street, NW  
Suite 400  
Washington, DC 20006

Counsel for:  
SMR Won

Keller & Heckman  
1001 G Street, NW  
Suite 500 West  
Washington, DC 20001

Counsel for:  
The Southern Company  
DCL Associates  
American Petroleum Institute  
US Sugar Corporation

Lewis H. Goldman  
1850 M Street  
Suite 1080  
Washington, DC 20036

Counsel for:  
Douglas L. Bradley

McCaw Cellular Communications, Inc.  
1150 Connecticut Avenue, NW  
Washington, DC 20036

Bryan Cave  
700 Thirteenth Street, NW  
Suite 700  
Washington, DC 2005-3960

Counsel for:  
CenCall, Inc.

Timothy P. Haley  
Centennial Telecommunication  
130 N. Bond Street  
Suite 201  
Bel Air, MD 21014

Latham & Watkins  
1001 Pennsylvania Ave., NW  
Washington, DC 20004

Counsel for:  
Vanguard Cellular Systems  
Raymond B. Grochowski

Charles C. Townsend  
Atlantic Cellular Company  
15 Westminster St., Suite 830  
Providence, RI 02903

Raymond J. Stone  
American Industrial & Marine Electronics, Inc.  
P.O. Box 715  
Dover, Delaware 19901

John E. Sonneland  
Courtesy Communications  
W. 801 Fifth Ave.  
Suite 410  
Spokane, WA 99204

Michael R. Carper  
4643 South Ulster Street  
Suite 500  
Denver, CO 80237

Morrison & Foerster  
2000 Pennsylvania Ave., N.W.  
Suite 5500  
Washington, DC 20006

Industrial Telecommunications Association, Inc.  
Alliance of Private 800/900 MHZ Licenses  
Frederick J. Day, Esq.  
1110 North Glebe Road  
Suite 500  
Arlington, VA 22201-5720

Cellular Telecommunications  
Industry Association  
Michael F. Altschul  
Vice President, General Counsel  
1250 Connecticut Avenue, N.W.  
Suite 200  
Washington, DC 20036

Association of Public-Safety  
Communications Officials International, Inc.  
Wilkes, Artis, Hedrick & Lawe, Chartered  
1666 K Street, N.W.  
Suite 1100  
Washington, DC 20006

Council of Independent Communication Suppliers  
Frederick J. Day  
Mark E. Crosby  
1110 N. Glebe Road  
Suite 500  
Arlington, VA 22201-5720

Organization for the Protection and  
Advancement of Small Telephone Companies  
Lisa M. Zgina, General Counsel  
21 Dupont Circle, N.W.  
Suite 700  
Washington, DC 20036

Dru Jenkinson, Inc.  
Bessozzi, Gavin & Cravn  
1901 L Street, N.W.  
Suite 200  
Washington, DC 20036

National Telephone Cooperative Assoc.  
David Cosson  
2626 Pennsylvania Ave., N.W.  
Washington, DC 20037

Spectrum Resources, Inc.  
A.C. Miller  
307 Annandale Road  
Suite 101  
Falls Church, VA 22042

Chadmoore Communications  
Keck, Mahin & Cate  
1201 New York Avenue, N.W.  
Washington, DC 20005-3919

Palmer Communications, Inc.  
Marianne H. Lepara  
12800 University Drive  
Suite 500  
Ft. Meyers, FL 33907-5333

Total Comm, Inc.  
William C. Wyatt, President  
2701 N. Van Buren  
Tulsa, OK 73703

Utilities Telecommunications Council  
Jeffrey L. Sheldon, General Counsel  
1140 Connecticut Ave., N.W.  
Suite 1140  
Washington, DC 20036

U.S. Small Business Administration  
Jere W. Glover, Esq.  
409 3rd Street, S.W.  
Washington, DC 20416

Communications Unlimited, Inc.  
Lewis H. Goldman  
1850 M. Street, N.W.  
Suite 1080  
Washington, DC 20036

Nextel Communications, Inc.  
Robert S. Foosner  
800 Connecticut Avenue, N.W.  
Suite 1001  
Washington, DC 20006

Telcelular de Puerto Rico, Inc.  
Law Offices of Richard S. Myers  
1030 15th Street, N.W.  
Suite 906  
Washington, DC 20006

Freedom Mobile Communication, Inc.  
Jerome M. Freund, President  
4 Ray Street  
Seaver Falls, PA 15010

Delta Communications, Inc.  
Kimo C. Chun, Director  
2646 Kalia Street  
Honolulu, HI 96819

Southwestern Bell  
Linda M. Hood  
173330 Preston Road  
Suite 100A  
Dallas, TX 75252

Associated Public Safety Communications Officer, Inc.  
Wilkes, Artis, Hedrick & Lane, Chartered  
366 K Street, N.W.  
Washington, DC 20006



Tara S. Williams